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Supreme Court, U.S.
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No. 98-1127

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center,

Petitioner,

v.

KEITH A. SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the phrase "conclusion of direct review," as used in 28 U.S.C. § 2244(d)(1)(A), means that the one-year period for filing a petition for writ of habeas corpus commences to run upon conclusion of certiorari review by this Court or when the time for seeking such review expires?

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STATEMENT OF THE CASE

Keith Smith is an inmate on Missouri's death row. Smith was convicted of a capital offense and sentenced to death. He appealed his conviction and sentence and the denial of post-conviction relief to the Supreme Court of Missouri, which affirmed the conviction. *State v. Smith*, 944 S.W.2d 901, 909 (Mo. banc), *cert. denied*, 118 S.Ct. 377 (1997).

Smith then filed his petition for writ of certiorari. On November 3, 1997, this Court denied Smith's petition. In anticipation of filing an application for federal habeas corpus relief, Smith initiated litigation in federal district court by filing a motion for appointment of counsel on November 13, 1997. The district court appointed present counsel on December 8, 1997.

On March 23, 1998, Smith filed a motion for entry of scheduling order requesting leave to file his petition for writ of habeas corpus under 28 U.S.C. § 2254 on or before November 3, 1998. The district court rejected respondent Bowersox' argument that the one-year limitations period under 28 U.S.C. § 2244(d)(1)(A) should begin to run from the date of the decision of the state's court of last resort. Instead, the district court found that the phrase "conclusion of direct review" found in Section 2244(d)(1)(A) has clearly and historically meant direct review of state court decisions by this Court through a petition for writ of certiorari. Pet. App. A13-14.

Accordingly, the district court entered its order finding November 2, 1998 to be the filing deadline for Smith's habeas corpus petition. Pet. App. A14. Respondent Bowersox moved for reconsideration and the district court denied that motion. On May 6, 1998, the district court granted Bowersox' motion for leave to file an interlocutory

appeal. *Id.* at A7-A8. The United States Court of appeals for the Eighth Circuit affirmed the district court's order in an opinion issued October 20, 1998. *See Smith v. Bowersox*, 159 F.3d 345 (8th Cir. 1998), reprinted in Pet. App. A1-A8.

ARGUMENT

This case does not present any difficult, novel or hotly contested issue of law. There is no split among the lower courts presented. To the contrary, although there are numerous lower court decisions in line with the Eighth Circuit's decision in this case, Smith is aware of no court which has adopted respondent Bowersox's constricted and historically inaccurate interpretation of the phrase "conclusion of direct review" to be limited to review by a state court of last resort. Rather, the lower courts have uniformly recognized "direct review" to include certiorari review of state court convictions by this Court. Respondent Bowersox has accordingly failed to identify any basis for this Court to grant a writ of certiorari.

I. THE EIGHTH CIRCUIT'S DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF EVERY OTHER FEDERAL COURT TO CONSIDER THE ISSUE.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") modified 28 U.S.C. § 2244 by establishing a one year period of limitation for filing petitions for a writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1)(A). The statute of limitations runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Id.

Every court to consider the question has concluded, as did the Eighth Circuit, that, for purposes of Section 2244(d)(1)(A), the "conclusion of direct review" is after this Court has issued its decision on a petition for certiorari or "when the time for filing such a petition expires . . . ." *Gonzalez v. DeTella*, 6 F. Supp. 780. 782 (N.D. Ill. 1998); *see also Cox v. Angelone*, 997 F. Supp. 188, 189 (E.D.Va. 1998) determining same); *Alexander v. Keane*, 991 F. Supp. 329, 334 (S.D.N.Y. 1998) (". . . .the Court rejects the

respondent's argument that the statute of limitations begins to run from the time the Court of Appeals affirmed the conviction without adding the ninety days in which a petition for certiorari could have been filed."); *Flowers v. Hanks*, 941 F.Supp. 765, 770 (N.D.Ind. 1996) (finding that "[s]ince review of a state criminal conviction by the Supreme Court of the United States is considered direct review of the conviction, . . . , the time period in which Flowers could have filed his petition for a writ of certiorari in the Supreme Court of the United States must be considered in calculating the time period in which petitioner could have sought direct review of his conviction for purposes of § 2244(d)(1)"; *Souch v. Harkins*, 21 F. Supp. 2d 1083, 1084 (D. Ariz. 1998) (same); *Moore v. Hawley*, 7 F. Supp. 2d 901, 903 (E.D. Mich. 1998) (same); *Baskin v. United States*, 998 F. Supp. 188, 189 (D. Conn. 1998) (same); *United States ex. rel. v. Dorsey*, 988 F. Supp. 917, 919 (D. Md. 1998)(same).[1]

In light of this unanimity among the lower courts (which Petitioner, tellingly, does not dispute or even acknowledge), there simply is no need for this Court to review the Eighth Circuit's decision.

II. THE EIGHTH CIRCUIT'S DECISION CORRECTLY CONSTRUES THE PHRASE "CONCLUSION OF DIRECT REVIEW."

Certiorari review is also unnecessary because the decision below is plainly correct. The nomenclature "direct review" has routinely and historically been used to refer to certiorari review by this Court of decisions of state courts of last resort. *Bell v. Maryland*, 378 U.S. 226, 232 (1964). For example, "direct review" clearly connotes

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[1] In addition, the Tenth Circuit has found that "direct review" under 28 U.S.C. § 2255 includes review by certiorari. *United States v. Simmonds*, 111 F.3d 737, 744 (10th Cir. 1997).

review by this Court of state court convictions in criminal proceedings, as opposed to "collateral review" of such convictions through federal habeas proceedings under 28 U.S.C. § 2254. *Id.*

In addition, there is also a well-established body of federal case law that interprets the phrase "final by the conclusion of direct review" to include an opportunity to seek certiorari. *See Teague v. Lane*, 489 U.S. 289, 295 (1989); *Caspari v. Bolden*, 510 U.S. 383, 390 (1994). When Congress elects to use terminology that has become commonplace in court decisions, the rules of statutory construction require that a statute's terms be interpreted in harmony with their accepted judicial meaning. *See Evans v. United States*, 504 U.S. 246, 263 (1952). Thus, "a chance to solicit review of constitutional issues before the United States Supreme Court, after the end of the state court proceedings, properly falls within the meaning of "'final by the conclusion of direct review'". *Smith*, 159 F.3d 345, 346 (8th Cir. 1998).

Respondent Bowersox has failed to come forward with any reasons why these many court decisions should be disregarded or why the commonly understood phrase "direct review" should be interpreted any differently in the wake of the AEDPA.

III. THE COURT OF APPEAL'S INTERPRETATION COMPORTS WITH THE CONGRESSIONAL INTENT BEHIND THE AEDPA

Finally, respondent Bowersox argues that the Court of Appeals' interpretation of the statute creates an internal inconsistency in the AEDPA, presumably because § 2263 (which applies in "opt-in" capital states) specifically excludes the time period for a petition for writ of certiorari. To the contrary, this

> reading would contribute to a coherent interpretation of the AEDPA as a whole by harmonizing the key features of the

> filing period sections. To put it another way, courts will hesitate to construe legislation ostensibly meant to streamline federal habeas actually to make it more complex by establishing different accounts of similar legal events.

Larry Yackle and Mark Tushnet, Symbolic Statutes and Real Law: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 29 (1997) (concluding that reading direct review so as to include petitioning for writ of certiorari would be the most reasonable interpretation) (citations omitted). Furthermore, the parallel provision in Section 2263

> runs a filing period from 'final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.' By negative implication, the more general reference here to the conclusion of "direct review" is not limited to proceedings in state court, but extends as well to proceedings before the Supreme Court of the United States.

Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 Buffalo L. Rev. 381, 387 (1996). If congress had wished to end direct review with the date of a state's Supreme Court decision, just as it did in § 2263, it could have done so. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (*per curiam*) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.")[2]

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[2] It is also significant that the opt-in statute of limitations treats the filing of a petition for certiorari "to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the Court of last resort of the state"--but not the time taken to prepare a timely certiorari petition--for tolling the statute. 28 U.S.C. § 2263(b)(1). The fact that the nonopt-in statute of limitations contains no provision for "tolling" during certiorari proceedings while the opt-in *does* contain

CONCLUSION

Because the courts are in wide agreement concerning the interpretation of this statutory provision and there is consistent, rapidly well-developing body of case law regarding the triggering of Section 2254 limitation's period, review by certiorari is not warranted.

Respectfully Submitted,

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such a tolling provision, supports the conclusion that the nonopt-in limitations period is not intended to begin running until after (and thus could sensibly not be tolled by) certiorari proceedings. This is because the opt-in limitations period, including when the opt-in tolling provisions are considered, is designed to be substantially shorter than the nonopt-in limitations period. *See* James S. Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure, 2d Ed., (1997 Supp.), pgs 100-104.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 2nd day of February, 1999, to:

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February 2, 1999

William Suter
Office of the Clerk
Supreme Court of the United States
Washington D.C. 20543

Re: Michael Bowersox v. Keith A. Smith
Case No. 98-1127

Dear Mr. Suter:

Enclosed for filing in the above-referenced matter please find Respondent's Motion for Leave to Proceed *In Forma Pauperis* as well as the original and eleven copies of Respondent's Opposition to Petition for Writ of Certiorari.

Thank you for your kind attention to this matter.

Very truly yours,

LATHROP & GAGE L.C.

By: William C. Odle
William C. Odle

WCO:mlh
Enclosures

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